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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 93-1314

LASZLO N. TAUBER, M.D.,
Petitioner,

v.

SALOMON FOREX, INC., SALOMON INC.,
SALOMON BROTHERS, INC., and FRED GATLING
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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AUTHORITY TO FILE AND POSITION OF AMICUS CURIAE

This brief is filed pursuant to the Court's Rule 37.2 by written permission of the parties to the case, and their written permission is filed herewith. This brief supports the position of the Petitioner.

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BRIEF *AMICUS CURIAE* OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

This brief, filed on behalf of the North American Securities Administrators Association, Inc. ("NASAA"), addresses the question whether commodity futures contracts and commodity options on foreign currency transactions are excluded from the jurisdiction of the Commodity Exchange

Act, 7 U.S.C. § 2 ("CEA").

NASAA is the association of the 65 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum where securities regulators work together to protect investors at the grassroots level and to promote fair and open capital markets. NASAA speaks as the collective voice for its members in forwarding those interests.

NASAA's interest in this case arises from the potential impact that the decisions of the District Court and Court of Appeals[1] may have on federal and state investor protection statutes regulating sales of securities, commodity futures, and other intangible investments. Commodity futures markets, like securities markets, are essential elements of the American financial system. American commodities and securities markets are universally acknowledged to be the most stringently regulated capital markets in the world, and state securities regulators believe it is no coincidence that these are also the world's strongest capital markets. The Fourth Circuit decision creates a potential regulatory gap in an area of investment laws which has been subject to repeated past abuses -- off-exchange futures and option contracts. If the decision is allowed to stand it could damage the integrity of U.S. capital markets, cause losses to the investing public, and strain state and federal resources required to enforce investment related statutes.

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[1] The opinion of the District Court is reprinted in the Appendix to the Petition for Writ of Certiorari, Pet. App. 27a-44a, and reported at 795 F. Supp. 768. The Court of Appeals opinion is reprinted at Pet. App. 1a-26a and reported at 8 F. 3d 966.

Beginning with the naked commodity option boiler room operations of the early 1970's which, at least in part, prompted Congress to create the Commodity Futures Trading Commission ("CFTC") in 1974,[2] state and federal law enforcement authorities have had to deal with a series of off-exchange, unregistered commodity options and other contracts being sold by boiler room "telemarketers" to unsophisticated members of the general public in attempts to avoid scrutiny by any investor protection agency. Because their schemes cannot stand regulatory scrutiny, these promoters have often claimed that their investment vehicles "fall through the cracks" between regulated securities and commodities related products and that they are "like" a legitimate but unregulated investment, such as the cash forward commodity market. Often the very commodity at issue here, foreign currency, has been the investment purveyed by these new bucket shops.

The states, CFTC, and self-regulatory organizations have worked together to assure that the leakage of illicit schemes through regulatory cracks is as small as possible, and Congress has amended the CEA as needed to fill those gaps.[3] NASAA has an interest in this case because the Fourth

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[2] Commodity Futures Trading Commission Act of 1974, 88 Stat. 1389 (hereinafter, the "CFTC Act"). The necessity for regulation of options transactions also led to amendments in 1978. SEN. REP. NO. 850. 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S.C.C.A.N. 2087, 2102-2103.

[3] House Agriculture Committee Chairman Pogue, the sponsor of the CFTC Act, explained in 1974 that the CFTC was created "to fill all regulatory gaps -- to regulate trading in futures and in options relating to commodities or commodity futures, because such trading is now poorly regulated if it is regulated at all." 120 Cong. Rec. 34736 (1974).

Circuit opinion creates a new vacuum which confidence men would eagerly fill. The Fourth Circuit failed to apply the *law* to the *facts*, and its sweeping interpretation of the "Treasury Amendment,"[4] in effect excludes all futures and options transactions in foreign exchange from CFTC oversight. This case should be reversed and returned to the district court for a factual determination of the nature of the products sold under a rational reading of the CEA.

REASONS FOR GRANTING THE WRIT

The definition of "security" under the federal securities laws is critical. It determines the scope and jurisdiction of the federal securities acts. The Supreme Court has interpreted the definition of "security" on many occasions since adoption of the Securities Act of 1933.[5] The definition and jurisdiction provisions of the Commodity Exchange Act have not received nearly so much attention, despite statutory origins reaching back to 1921.[6] The Court should grant review of this case because of the importance of the issue to be decided -- the scope of the CEA -- for the U.S. financial regulatory system, the safety of our capital markets, and investor confidence. In addition, the case presents a conflict between the Fourth Circuit, on one hand, and the Second and Seventh Circuits, on the other, in the interpretation of the

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[4] 7 U.S.C. § 2(ii).

[5] 15 U.S.C. § 77a, *et seq.*

[6] For a review of the history of the CEA and its predecessor, the Futures Trading Act, *see,* William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act,* 41 Vanderbilt L. Rev. 473, 477 (1988).

jurisdiction of the CEA and the CFTC.

Finally, the case merits the attention of the Court to correct a serious error made by the lower courts which could have widespread, adverse consequences for investor protection laws. Congress, in adopting the CEA, recognized the legitimacy of existing commercial transactions, such as "cash" and "cash forward" contracts for many physical commodities and foreign currency transactions between institutional and commercial users. It created narrow exceptions to the CEA, including the Treasury Amendment, to allow those markets to continue their operation without additional interference from the government. Congress did not, however, adopt a *carte blanche* exclusion from regulation for foreign currency or any other commodity when traded under circumstances that would foster new bucket shop abuses.

The issue in this case, whether the transactions between Petitioner and Respondents fell within the coverage of the CEA, was decided on motion for summary judgment. The Courts below assumed that the disputed transactions involved futures contracts or commodity option contracts which would have been covered by the CEA but for the exclusionary language of the Treasury Amendment. In so doing, the Courts below failed to make a crucial, factual analysis and reopened loopholes in the regulatory structure that the Congress, states, CFTC, and self-regulatory organizations have spent years plugging.

This case presents an important opportunity for the Supreme Court to announce for the first time its interpretation of the modern CEA and the jurisdictional reach of that statute.

A. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION CONCERNING THE SCOPE OF THE COMMODITY EXCHANGE ACT.

The Commodity Exchange Act regulates financial transactions, depending on the nature of the transactions and marketplace in which they occur, and dictates that certain kinds of transactions must occur in certain regulated markets. The CEA confines trading in contracts for future delivery to boards of trade that are designated contract markets for those contracts, and it strictly proscribes trading in other, off-exchange instruments such as commodity options except under circumstances permitted under the Act and CFTC regulations. 7 U.S.C. § 6, 6c. This is a salient feature of the provisions in the CEA that prohibit the creation of bucket shops and the centerpiece of the CEA regulatory scheme.

The CEA provides that the jurisdiction of the CFTC to regulate commodity futures, option, and leverage contracts is exclusive, and that state regulatory authority is preempted as to covered transactions. 7 U.S.C. § 2(i). This regulatory regime differs from securities regulation, where jurisdiction of the state and federal governments is shared and largely co-extensive.[7] For transactions in which state jurisdiction is preempted, however, the comprehensive provisions of the CEA apply and the CFTC has regulatory and enforcement

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[7] State jurisdictional savings provisions are contained in the Securities Act of 1933, 15 U.S.C. § 77r, the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), the Investment Company Act of 1940, 15 U.S.C. § 80a-49, the Investment Adviser's Act of 1940, 15 U.S.C. § 80b-18a, and the Trust Indenture Act, 15 U.S.C. § 77zzz.

powers. States do retain authority over transactions not conducted on a contract market, not regulated by a foreign exchange, and not subject to the CFTC's exclusive jurisdiction of regulated commodity options or leverage transactions, as well as over persons required to be licensed under the CEA who are not so licensed.[8]

Prior to the adoption of the amendments to the CEA, state securities regulators and the SEC litigated a number of cases for enforcement of securities laws against bucket shop operators who were selling "naked" commodity options on the "world commodities" that, prior to 1974, were not regulated by the CFTC.[9] These options often represented nothing more than a bet between the investor and dealer on the price of the commodity being sold.[10] Past abuses in commodity option transactions have indeed been so great that, before adoption of the CFTC Act, commodity options on the agricultural goods that the CEA covered was banned altogether, and after an unsuccessful experiment, options trading was again banned from 1978 to 1983 until the CFTC completed a comprehensive overhaul of options trading

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[8] 7 U.S.C. § 13a-2. *See,* II P. Johnson & T. Hazen, *Commodities Regulation* § 3.98 (2d ed. 1989 & Supp. 1992).

[9] *See,* Joseph C. Long, *The Naked Commodity Option Contract as a Security,* 15 WILLIAM AND MARY L. REV. 211, 213-218 (1973) (hereinafter "Long"); *Board of Trade v. SEC,* 677 F. 2d 1137, 1142-1143 (1982), *vacated as moot* 459 U.S. 1026 (1982).

[10] Long, at 211-12.

regulation.[11] After adoption of the CFTC Act brought the world commodities and commodity options under the CEA, illicit promoters have continued to sell the same or similar investments under claims that they represented, not commodity options which are subject to CFTC jurisdiction, but other contracts denominated as "cash forward" contracts, as well as foreign currency contracts. The purpose is simply to evade regulatory scrutiny.[12]

A leading case on enforcement of the CEA against such schemes is *CFTC v. Co Petro Marketing Group, Inc.*, 680 F. 2d 573 (9th Cir. 1982). That case involved sales to the general public of investments in contracts for the purchase of gasoline.[13] The Court had no difficulty finding that the

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[11] The CFTC Act continued the ban on agricultural options and brought options on other commodities under the CEA. SEN. REP. NO. 1131, 93d Cong., 2d Sess. 4 (1974). In 1978 commodity options were first banned by CFTC rule, 43 F.R. 16153 (April 17, 1978), and then by statute, Pub. L. No. 95-405, 92 Stat. 865, 867. The 1978 ban was repealed the Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat.2294, which made all options trading subject to strict regulation by the CFTC.

[12] Off-exchange commodity futures and options that have been promoted as "unregulated" commodity transactions include precious metals "forwards", *CFTC v. American Metals Exchange*, 693 F. Supp. 168 (D. N. J. 1988); coal contracts, *CFTC v. National Coal Exch., Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 21,424 (W. D. Tenn. 1982); and foreign currency options, *CFTC v. American Board of Trade*, 803 F. 2d 1242, (2d Cir. 1986) (discussed *infra*, in Part B), and *CFTC and State of Georgia v. Sterling Capital Company*, Comm. Fut. L. Rep. (CCH) ¶ 21,169 (N.D. Ga.), *modified in other respects*, Comm. Fut. L. Rep. (CCH) ¶21,170 (N.D. Ga. 1981).

[13] One of the *Co Petro* defendants, Harold Goldstein, had a history of legal proceedings against him resulting from his sales in the 1970's of naked commodity options described in Professor Long's article. *Co*

contracts were illegal, off-exchange contracts for future delivery, where the contracts were sold for speculative purposes, were not predicated upon the expectation that delivery of gasoline would occur, were of relatively standardized form, and were at prices set unilaterally by the promoter based on spot market rates. *Id.*, at 580-581.

Securities regulators have traditionally attacked boiler rooms such as the commodity option bucket shops as illegal investment contracts, using the classic definition laid down by the Supreme Court in *SEC v. W. J. Howey Co.*[14] The CFTC Act created a new agency with new enforcement tools specifically to combat commodity fraud, including limited authority of states to bring enforcement actions under the CEA under 7 U.S.C. § 13a-2. Eighteen states have adopted versions of the Model State Commodity Code,[15] promulgated by NASAA, to exercise state enforcement authority to the fullest extent allowable under the CEA.[16]

As will be shown in Part C of this brief, the Fourth Circuit has made a significant and unwarranted expansion of a narrow exclusion to the CEA regarding foreign currency transactions. History has amply demonstrated the willingness

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Petro, at 584; *Long*, at 214-215.

[14] 328 U.S. 293 (1946). The *Howey* test requires proof that the disputed instrument is (1) an investment of money (2) for profit (3) in a common enterprise (4) with the expectation that the profit will come from the efforts of others.

[15] NASAA Rep. (CCH) ¶ 4401, *et seq.*.

[16] A list of states and statutory references for the Model State Commodity Code is located in NASAA Rep. (CCH) ¶ 264.

of fraudulent promoters to exploit such a weakness. A review of that decision and definitive pronouncement by the Supreme Court is therefore necessary.

B. THE COURT SHOULD GRANT CERTIORARI BECAUSE THERE IS A CONFLICT AMONG THE CIRCUITS ON THE SCOPE OF THE TREASURY AMENDMENT.

The Second and Seventh Circuits have reached decisions on the Treasury Amendment that differ from the Fourth Circuit's in this case. The opinion below discussed both of these cases but concluded incorrectly that its own decision was consistent with them.

In *CFTC v. American Board of Trade,* 803 F. 2d 1242 (2d Cir. 1986), the Court affirmed an injunction prohibiting a company from selling commodity options on, among other things, foreign currency. The Defendant contended that the Treasury Amendment excluded its currency options from CEA jurisdiction. The Court held:

> An option transaction giving the option holder the right to purchase a foreign currency by a specified date and at a specified price does not become a "transaction in" that currency unless and until that option is exercised. . . . Hence the Treasury Amendment did not, on its face, appear to exclude defendants' foreign currency options business from regulation. *Id.,* at 1248.

The Second Circuit opinion reviewed the legislative history of the Treasury Amendment, including the letter from the Treasury Department which has been the subject of much

debate in the briefs and opinions in the present case, and drew a different conclusion than did the Fourth Circuit. In *CFTC v. American Board of Trade*, the Court found that the Treasury Amendment was included in the CEA because "the protections of the Act were not needed for the sophisticated financial institutions already subject to regulation, that participated in such transactions", and that it was not designed to "exclude from regulation foreign currency options transaction such as those defendants engaged in with private individuals." *Id.*, at 1249.

CFTC v. American Board of Trade cannot be harmonized with the Fourth Circuit's opinion. The Second Circuit held that the Treasury Amendment was directed at a specific market, comprised of financial institutions and sophisticated dealers. The Fourth Circuit held flatly that all futures trading in foreign currencies is excluded from CEA jurisdiction.

> We are thus satisfied that under the appropriate interpretation of the Treasury Amendment, all off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA. Pet. App. 17a.

Though the Fourth Circuit recognized that a key factor in *CFTC v. American Board of Trade* was the nature of the parties involved, Pet. App. 21a, the Fourth Circuit opinion disagrees with the Second Circuit on both the purpose of the Treasury Amendment and its scope, because the Fourth Circuit reached its decision without making the necessary inquiry into the facts surrounding the market and the participants in the disputed trades.

Likewise, the Fourth Circuit does not square with the Seventh Circuit decision in *Board of Trade v. SEC, supra,* note 3. That case involved a jurisdictional dispute over the authority of the SEC to approve options on government securities for trading on a national securities exchange. The Seventh Circuit found that the SEC lacked that authority because the instruments involved were commodity options subject to regulation under the CEA. The SEC argued that the Treasury Amendment exclusion of transactions in government securities applied to options on them, which were being traded on the Chicago Board Options Exchange. The Court held that an option on a government security is not a transaction in the government security itself, because "the options market may exist without any transactions in the commodity itself." *Id.*, at 1154.

Board of Trade v. SEC also held that the legislative history of the Treasury Amendment made it "quite clear" that the amendment was adopted only to prevent dual regulation by the bank regulators and CFTC of the interbank market for these instruments. *Id.*

The Fourth Circuit stated that *Board of Trade v. SEC* was based upon the fact that the instruments involved were traded on an "exchange." Pet. App. 22a. Such is not the case. In *Board of Trade v. SEC*, once the Seventh Circuit found that options covered by the CEA were being traded, the result was that such instruments could only be traded under the auspices of the CFTC. *Board of Trade v. SEC,* at 1143-1144. The Seventh Circuit correctly based CEA jurisdiction on the existence of a regulated transaction (commodity options) rather than a regulated "exchange," *i.e.*, board of

trade or contract market.[17] The Fourth Circuit wrongly concluded, in conflict with the Second and Seventh Circuits, that options could only be regulated if traded on an "exchange," a term not defined in the CEA nor used in the Treasury Amendment.

The Fourth Circuit's dicta, at Pet. App. 25a-26a, on the nature of the markets or sophistication of the Petitioner lends no support to its own direct holding that all off-exchange futures and trading in foreign currencies is exempt from CEA jurisdiction. The opinions below did not make necessary findings regarding the marketplace and market participants, as were undertaken in *CFTC v. American Board of Trade* and *Board of Trade v. SEC;* they are odds with the holdings of those circuits and should be reviewed by the Supreme Court.

C. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT MISINTERPRETED THE SCOPE OF THE CEA AND THE TREASURY AMENDMENT.

Prior to 1974, the CEA covered only a narrow list of "agricultural commodities" in which futures trading occurred on established and recognized U.S. contract markets.[18] The CFTC Act expanded the definition of commodities to encompass other marketplace activities in items then known

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[17] Under the CEA, commodity options, unlike contracts for future delivery, may be traded "off-exchange" under CFTC regulations. In *Board of Trade v. SEC,* whether the trading took place on an "exchange" was not a factor in the decision at all. *See, Board of Trade v. SEC,* at 1143, note 12, and 1144, note 13.

[18] Long, at 213-214.

as "world commodities" as well as in "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(3). In determining the coverage of the CEA, the emphasis is placed on whether an activity is the subject of *futures trading* under the Act, or another activity covered by the Act such as commodity options trading. If an activity is regarded as futures trading, it must take place on a "contract market" designated by the CFTC.

> (a) It shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a *contract for the purchase or sale of a commodity for future delivery* (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions) unless --
>
> (1) such transaction is conducted on or subject to the rules of a *board of trade* which has been *designated by the Commission as a "contract market"* for such commodity; 7 U.S.C. § 6.[19] (Emphasis added.)

The leading commentators in the field have described this

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[19] Subsections (2) and (3) of Section 6, not relevant here, require that the futures contract be executed by a member of the contract market and that the futures contract be evidenced by a writing.

provision as the "monopoly" of the contract markets.[20] To understand the statutory framework that this approach creates, it is necessary to understand the relationship of the terms used in Section 6 to each other. This the Fourth Circuit failed to do.

The lower courts and the CFTC have laid down what have become known as the "indicia" of futures contracts:[21]

> . . . they involve the purchase or sale of a commodity for delivery in the future at a price or pricing formula that is agreed upon when the transactions are initiated; they are standardized as to terms and conditions other than price; unlike commercial forward contracts or traditional installment agreements, they are undertaken primarily to assume or shift the risk of commodity price changes and generally entered into for purposes of obtaining delivery of the commodity, but rather are discharged through offsetting transactions or other buy-back arrangements. 50 F.R. 11656; Comm. Fut. L. Rep. (CCH) ¶ 22,518 (CFTC Office of General Counsel Interpretation, March

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[20] I Johnson & Hazen, § 1.06.

[21] The term "future delivery" is defined in the CEA only by a negative statement. Whatever future delivery is, it is defined to exclude "any sale of any cash commodity for deferred shipment or delivery." 7 U.S.C. § 1a(11). The exclusion is generally interpreted to cover cash or "spot" transactions and "commercial, merchandising transactions in physical commodities in which delivery actually occurs but is delayed or deferred for commercial purposes." *Regulation of Hybrid and Related Instruments*, 2 Comm. Fut. L. Rep. (CCH) ¶ 23,995, at 34,942 (CFTC , Dec. 11, 1987).

25, 1985).[22]

If contracts for future delivery are involved, the CEA requires that the contracts must be traded on a board of trade that has been designated as a contract market by the CFTC. 7 U.S.C. § 6. As noted in *Co Petro, supra*, at 581, "board of trade" is defined broadly in the CEA to "include or mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling commodity or receiving the same for sale on consignment." *Co Petro* held that a single company in business to purvey its contracts for future delivery could be an association covered by the "board of trade" definition, where its contracts otherwise included the elements of futures trading and were marketed to the general public.

The Fourth Circuit held that CFTC authority to prevent fraud and abuse in foreign currency transactions only extended to those transactions that take place on the floor of a commodities exchange. The Fourth Circuit failed to understand that the reference, in 7 U.S.C. § 2(i), to trading futures contracts on a "contract market" or a "board of trade" in the jurisdictional provision, though unartfully expressed,

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[22] The Office of General Counsel also noted that characteristics common to futures contracts would include standardized terms, initial deposit and maintenance of "margin" or like payments, and right or interest in the customer in a particular lot or other commodity unit. 50 F.R. 11656, 11657 at note 2. *See also, In re Stovall,* Comm. Fut. L. Rep. (CCH) ¶ 20,941 (1979), listing as four "classic" elements, standardized contract terms, instruments directly or indirectly offered to the general public, earnest money or margin for security, and transactions primarily for the purpose of shifting risk rather than for transferring ownership of commodities.

is only a recitation of the requirement that trading take place on a contract market, and not part of the definition itself. To hold otherwise guts the bucket shop prohibition in the CEA by allowing futures trading to occur elsewhere than on designated contract markets. The Fourth Circuit interpretation, that foreign currency trading may only be regulated by the CFTC *if* the trading is on a con act market, is a case of circular logic -- the Court looks to the market and sees if the CFTC regulates that market, to tell whether the CFTC regulates it.

As the CFTC and the Ninth Circuit have said, "the requirement that a futures contract be executed on a designated contract market is what makes the contract legal, not what makes it a futures contract." *In re Bybee,* 945 F. 2d 310, 313 (9th Cir. 1991); citing *First National Monetary Corp.,* Comm. Fut. L. Rep. (CCH) ¶ 22,698, at 30,970 (1985).

This *amicus curiae* brief adopts the view of the legislative history of the Treasury Amendment put forth in Mr. Tauber's Petition for Writ of Certiorari. Pet. for Cert. 26-29. That history indicates that the Treasury Amendment is intended to shield from additional regulation the institutional market for foreign currency that has existed among banks for many years and is not a blanket exemption for off-exchange futures contracts in particular types of enumerated commodities. Because that institutional market bears a resemblance to traditional futures contracts, the Treasury Amendment was necessary, but it did not authorize new products otherwise meant to be regulated by the CFTC. The Fourth Circuit erred in failing to make a factual inquiry whether the transactions in the present case properly fell within that traditional institutional foreign currency market,

or whether they represented new instruments which the CFTC must approve.

The Treasury Amendment was an expedient means to protect trading in existing markets from unnecessary additional regulation. The foreign currency market in question had undeniable elements of futures contracts, especially in light of the expansive new definition of commodity and the extended reach of the CEA after 1974. The adoption of the Treasury Amendment made it unnecessary to engage in an extensive analysis of the elements of futurity for these existing markets, as the legislative history clearly evidenced an intent to exempt them from the CEA. But as to novel contracts and schemes, it would frustrate the intent of the law to simply extend a blanket exemption to anything that might encompass foreign currency, as the Fourth Circuit has done. That is why it was necessary to engage in the factual inquiry into the marketplace and participants, which the Courts below failed to do.

The better approach was recently demonstrated in *CFTC v. Standard Forex, Inc.*, No. CV-93-0088 (Aug. 9, 1993), *appeal pending*, No. 93-6255 (2d Cir). The defendant in that CFTC injunctive action claimed that the foreign currency contracts being sold were excluded from CFTC jurisdiction by the Treasury Amendment. The Court explained that the ambiguity in the Treasury Amendment resulted from the difficulty in determining what transactions are not excluded because they "involve the sale thereof for future delivery conducted on a board of trade." *Id.*, slip opinion at 17. The Court then analyzed the legislative history of the Amendment, as is appropriate to resolve a statutory ambiguity, and found, following other opinions including

CFTC v. American Board of Trade and *Board of Trade v. SEC*, that the Treasury Amendment exclusion was limited to the interbank market for sophisticated financial institutions. *Id.*, at 22-23. The Court specifically declined to follow the District Court decision in the present case. *Id.*, at 24.

The *Standard Forex* contracts, like the Salomon Forex options, were sold by a private company and not traded on a recognized contract market. Using the same analysis as employed in *CFTC v. Co Petro supra,* the Court had no trouble finding Standard Forex to be an illegal "board of trade," given the purpose of the statute and its context in legislative history.

> [V]iewed in the context of the entire legislative history, the term "formally organized futures exchange" refers to situations in which people create a formal structure for unsophisticated investors who need the assistance of such a formal organization in order to carry out their trading, as opposed to sophisticates who can deal among themselves pursuant to relatively informal understandings. The Senate report follows the language of the letter submitted by the Treasury Department which instigated the adoption of the Treasury Amendment. . . . That letter referred to "organized exchanges" as including "individuals and small traders who may need to be protected by some form of governmental regulation," in order to contrast such trading contexts with sophisticated interbank transactions. . . Thus, the proper interpretation of the Committee's use of the letter's terminology is to view the use of the term "organized exchanges" as a reference to situations where private unsophisticated investors are transactional participants. *Id.*, at 25.

Is such the situation in the present case? One cannot tell, because the Courts below failed to make the proper analysis of the marketplace, its participants, and its use for speculation versus other commercial purposes.

Standard Forex demonstrates the necessity for Supreme Court review of this case. It is a case where bucket shop promoters seized upon the Treasury Amendment to claim the CFTC does not apply to them because they are "like" the Salomon Forex operations -- just as has been the case in past scams. A more reasoned approach to application of the CEA must be announced by this honorable Court.

CONCLUSION

For the reasons set forth above and those outlined in the brief of the Petitioner, NASAA joins Petitioner Tauber in urging the Court to grant the petition for writ of certiorari and hear the case on its full merits.

Respectfully Submitted,

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